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No. 84-1043

In the Supreme Court of the United States

October Term, 1984

JOHN C. SHIMMAN,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly interpreted this Court's prior decisions in regard to the "bad faith" exception to the American Rule and properly applied such decisions to deny petitioner's request for attorney fees for services rendered on appeal, as supported by a majority of the circuits?

2. Whether the Sixth Circuit correctly held that the "common benefit" exception to the American Rule is inapplicable in the present action because petitioner's "catalyst" failed to confer a substantial benefit to a recognizable class?

3. Whether the Sixth Circuit correctly determined that petitioner's civil rights claims under §§1985(3) and 1986 were insubstantial absent the requisite racially discriminatory intent?

TABLE OF CONTENTS

QUESTIONS PRESENTED I
TABLE OF AUTHORITIES III
OPINIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 3
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE WRIT 7

A. Introduction 7
B. The Sixth Circuit Correctly Interpreted This Court's Prior Decision in Holding That the "Bad Faith" Exception to the American Rule Does Not Permit Attorney Fees on Appeal for Acts Giving Rise to the Litigation 8
C. The Sixth Circuit's "Bad Faith" Holding, Denying Attorney Fees for Appellate Work, Is Supported by a Majority of the Circuits 15
D. The Sixth Circuit Correctly Decided That the "Common Benefit" Theory Is Inapplicable in the Present Case 18
E. Petitioner Fails to Pose a Question for This Court on His §§1985 and 1986 Claims Absent Discrimination Against a Constitutionally Protected Class 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) ..... *passim*
Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) 7
Bell v. School Bd. of Powhatan Cty., 321 F.2d 494 (4th Cir. 1963) 10, 12, 17
Bise v. International Brotherhood of Electrical Workers, 618 F.2d 1299 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) 20
Bradford v. Textile Workers of America, 563 F.2d 1138 (4th Cir. 1977) 21
Christopher v. Safeway Stores, Inc., 644 F.2d 467 (5th Cir. 1981) 21
Copeland v. Martinez, 603 F.2d 981 (D.C. Cir. 1979) 16
Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (per curiam) 17
Emmanuel v. Omaha Carpenters District Council, 560 F.2d 382 (9th Cir. 1977) 20, 21
F.D. Rich Co., Inc. v. United States, etc., 417 U.S. 116 (1974) 14, 17
Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 7, 9
Griffin v. Breckenridge, 403 U.S. 88 (1971) 23, 24
Hagans v. Lavine, 415 U.S. 528 (1974) 23, 24
Hall v. Cole, 412 U.S. 1 (1973) ..... *passim*
Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976) 21
Hensley v. Eckerhart, 461 U.S. 424 (1983) 9

Huecker v. Milburn, 53[illegible] F.2d 1241 (6th Cir. 1976) 17
In Re Central R. Co., 48[illegible] F.2d 208 (3d Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1131 (1974) 8
Lipsig v. National Student Marketing Corp., 663 F.2d 178 (D.C. Cir. 1980) 15
Maceira v. Pagan, 698 F.2d 38 (1st Cir. 1983) 21
Maher v. Gagne, 448 U.S. 122 (1980) 22
McDonald v. Oliver, 525 F.2d 1217 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976) 20
McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) 16
McQuiston v. Marsh, 707 F.2d 1082 (9th Cir. 1983) 17
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 10, 16-17, 19, 20
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 12
Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (1979), *cert. denied*, 436 U.S. 913 (1978) 6
Perkins State Bank v. Connolly, 632 F.2d 1306 (5th Cir. 1980) 16
Richardson v. Communication Workers of America, 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976) 17
Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (4th Cir. 1951) 10, 12, 16, 17
Rosario v. Amalgamated Ladies Garment Cutters' Union, Local 10, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) 20
Schlein v. Smith, 160 F.2d 22 (D.C. Cir. 1947) 16
Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977) 22
Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980) 5, 19

Shimman v. International Union of Operating Engineers, Local 18, 744 F.2d 1226 (6th Cir. 1984) (*en banc*) ..... *passim*
Shimman v. International Union of Operating Engineers, Local 18, 719 F.2d 879 (6th Cir. 1983) 5
Stein v. Mutual Clerks' Guild of Mass., Inc., 560 F.2d 486 (1st Cir. 1977) 21
Stovall v. Price Waterhouse Co., 652 F.2d 537 (5th Cir. 1981) 15
Straub v. Vaisman and Co., 540 F.2d 591 (3d Cir. 1976) 16
Summit Valley Industries v. Local 112, United Brotherhood of Carpenters, 456 U.S. 717 (1982) 9
United Brotherhood of Carpenters v. Scott, 103 S.Ct. 3352 (1983) 24
Van Gernert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (*en banc*), *aff'd on other grounds*, 444 U.S. 472 (1980) 8
Vaughan v. Atkinson, 369 U.S. 527 (1962) ..... *passim*
Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (*en banc*), *rev'd on other grounds sub nom.*, 421 U.S. 240 (1975) 19

Statutes

28 U.S.C. §1254 2
28 U.S.C. §1343(3) 24
29 U.S.C. §411 3
29 U.S.C. §412 ..... 3, 9
42 U.S.C. §1983 24
42 U.S.C. §1985(3) 3, 4, 21, 22, 23, 24
42 U.S.C. §1986 ..... 3, 4, 21, 23
42 U.S.C. §1988 ..... 3, 7, 21, 22, 24

Other Authorities

Federal Rules of Civil Procedure, Rule 11 ..... 12, 13
Federal Rules of Civil Procedure, Rule 39 5
Federal Rules of Civil Procedure, Rule 59 5
6 MOORE'S FEDERAL PRACTICE ¶54.77[2] (1972) 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

In 1972, Petitioner commenced this action in the United States District Court for the Northern District of Ohio, Western Division. On October 16, 1975, the District Court rendered judgment on behalf of petitioner (*See* Petition, p. 3). Damages were subsequently awarded on February 14, 1977 (*See* Petition, p. 4).

On May 21, 1980, the United States Court of Appeals for the Sixth Circuit partially reversed the judgment of the District Court and remanded the case with directions to dismiss the action against the International Union. The court also affirmed the judgment of liability against all other defendants, reduced the amount of damages awarded, and awarded attorney fees for work done at trial (*See* Petition, p. A89).

Pursuant to petitioner's request, on October 20, 1981, the District Court awarded petitioner additional attorney fees for services rendered on appeal (*See* Petition, p. 5).

On May 11, 1982, the District Court denied respondent's Motion for a New Trial or to Amend Judgment, and on October 21, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's award of attorney fees (*See* Petition, p. 5).

On December 5, 1983, the United States Court of Appeals for the Sixth Circuit granted a rehearing *en banc*, and on October 1, 1984, the Appeals Court reversed the decision of the District Court and remanded the case to enter an order denying attorney fees for work done on appeal.

On October 24, 1984, the District Court entered an order vacating the award of attorney fees.

JURISDICTION

Petitioner filed a Petition for Writ of Certiorari within 90 days of October 1, 1984, pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

Petitioner maintains that the following statutes are applicable:

29 U.S.C. §§411(a)(1) and 411(a)(2);

29 U.S.C. §412;

42 U.S.C. §1985(3);

42 U.S.C. §1986;

42 U.S.C. §1988.

STATEMENT OF THE CASE

In 1972, appellee John C. Shimman [hereafter "Shimman"] filed suit in the United States District Court for the Northern District of Ohio, Western Division [hereafter "District Court"] against appellant International Union of Operating Engineers, Local 18 [hereafter "Local 18"], the International Union of Operating Engineers, AFL-CIO [hereafter "International Union"] two members and an individual officer of Local 18. Shimman alleged violations of Sections 411(a)(1) and (2) of the Labor-Management Reporting Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §411(a)(1) and (2), Sections 1985(3) and 1986 of the Civil Rights Act of 1881 [hereafter "Civil Rights Act"], 42 U.S.C. §1985(3) and §1986, and the Ohio common law tort of assault and battery.

In 1975, the District Court, sitting without a jury, rendered judgment against all defendants on Shimman's claims under the Landrum-Griffin Act and on the pendent claim

of assault and battery.[1] After the trial on the issue of damages, the District Court entered judgment against all defendants, awarding Shimman $107,067.99 in compensatory damages and $675,000 in punitive damages against the various defendants. Additionally, the District Court awarded attorney fees in the amount of $75,000.

All defendants appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit

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1. The District Court dismissed Shimman's claims under 42 U.S.C. §§1985(3) and 1986:

> Nevertheless, the Court does not believe that it is necessary to strain the meaning of §1985 in order to grant relief to the plaintiff. That statute was enacted a long time ago, to deal with problems which, while they still exist, are clearly within its compass. §411 is strong enough to stand on its own feet. It is not necessary to resort to §1985 to give it force. It is perhaps arguable that it was necessary to enact §411 because §1985 was not intended to, and did not, cover the areas of our society with which §411 deals.
>
> *The Court concludes that the plaintiff has no right to recover against the defendants or any of them under the provisions of Title 42 U.S.C. §1985.*
>
> III. Plaintiff's Third Cause of Action
>
> The Court's conclusion as to plaintiff's second cause of action seems to be dispositive of his third cause of action. Title 42 U.S.C. §1986 is specifically confined to relief against persons who were aware of conspiracy to violate §1985, and having the power to prevent any wrongdoing, neglected or refused to do so. Since the Court has found that there was no showing of a conspiracy in violation of §1985, *the plaintiff's claims under §1986 must fail* (emphasis added).

In its Opinion of February 14, 1977, the Court again emphasized that none of the relief granted was based in any part on Shimman's §§1985 and 1986 claims:

> The defendants suggest that under *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), the plaintiff is not entitled to recover attorney fees. That decision, which has since been reversed by the Congress, deals with the so-called "private attorney general" concept in civil rights actions. This Court has never accepted that concept, but even if it had, in this case it has dismissed the plaintiff's civil rights claims.

in *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) (hereafter referred to as "the 1980 appeal"). A three judge panel reversed the imposition of liability against the International Union and significantly reduced by $150,000 the amount of punitive damages awarded against the remaining defendants. Notably, the Sixth Circuit ordered that each party bear its own costs, and remanded the case to the District Court for the execution of judgment.

Following the Sixth Circuit's decision, Shimman filed an application for additional fees in the District Court, seeking $56,178 as attorney fees for the work his counsel performed during the 1980 appeal. Although respondent contested the District Court's authority to issue such an award, District Court Judge Young filed an opinion awarding Shimman the additional attorney fees in the amount requested.

On October 30, 1981, Local 18 moved for a new trial or to amend judgment pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure. The District Court denied Local 18's Motion for New Trial on May 11, 1982. On June 4, 1982, Local 18 timely filed its Notice of Appeal and oral argument was held in the summer of 1983.

In a 2-1 opinion rendered on October 21, 1983 [hereafter "the 1983 panel decision"], a three judge panel of the Sixth Circuit held that the District Court had the authority to award attorney fees for time expended on the 1980 appeal, concluding that Rule 39(a) of the Federal Rules of Appellate Procedure and the previous order of this Court directing the parties to bear their own costs constituted no bar to the award. *Shimman v. International Union of Operating Engineers, Local 18*, 719 F.2d 879 (6th Cir. 1983).

More importantly, in that opinion, the majority rejected as without merit appellant's contention that only the court of appeals can make an award of attorney fees for services rendered in that court, citing *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (1979), *cert. denied*, 436 U.S. 913 (1978). Furthermore, the majority concluded that under the "bad faith" rationale enunciated in dicta in *Hall v. Cole*, 412 U.S. 1 (1973), Shimman was entitled to an award of attorney fees at both the district and appellate court levels.

In a strong dissenting opinion, Circuit Judge Merritt contended that the majority had failed to articulate any recognized theory to support the award of attorney fees, and that an award of attorney fees for services rendered on appeal in this particular instance was in direct contravention of the court's prior order that each party should bear its own costs. Moreover, Judge Merritt stated that this was the first case brought in the Sixth Circuit in which a party, in the absence of statute, has received attorney fees simply because of wrongful conduct unconnected with the trial itself.

Based on a determination that the panel decision was contrary to previous decisions of the Sixth Circuit, that consideration by the full Court was necessary to maintain uniformity of decisions in the Sixth Circuit, and based on the determination that this matter involved several questions of exceptional importance, respondent timely filed on November 4, 1983, a Petition for Rehearing En Banc. Respondent again contended that the District Court was precluded as a matter of law from awarding attorney fees for work done on appeal absent a finding of bad faith in the conduct of the litigation; Local 18 also contended that the Sixth Circuit's 1980 mandate that "each side will bear its own costs" implicitly resolved

in its favor the issue of attorney fees incurred in the appeal.

On December 5, 1983, the Sixth Circuit entered its order granting a rehearing of this case *en banc*, and subsequently reversed the attorney fee award on October 1, 1984. Petitioner, upon filing the Petition for Writ of Certiorari, seeks review of the October 1, 1984 *en banc* judgment rendered by the Sixth Circuit.

REASONS FOR DENYING THE WRIT

A. Introduction

There is an absence of both a substantial conflict among the circuits regarding exceptions to the American Rule,[2] as well as an important question under 42 U.S.C. §1988, and therefore, a decision by the Supreme Court in this matter is unnecessary. The Sixth Circuit's decision is supported by the other circuits overall, and the decision clarifies many of the cases cited by petitioner to be in opposition to the position taken by the Sixth Circuit.

Petitioner contends that the Sixth Circuit's holding that the "bad faith" exception to the American Rule against awarding attorney fees only includes bad faith either in bringing an action or during the course of the litigation, contravened decisions in all other federal circuits. The petitioner, however, misconstrues the holding completely. The issue in the present case does not involve an award

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2. The American Rule is a statement of a longstanding policy that attorney fees are not ordinarily recoverable absent a statute or an enforceable contract providing for such fees. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). The rule was adopted by this Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

of attorney fees for services rendered at the trial level, but rather is an attempt to determine whether there can be an attorney fee award for appellate work. The Sixth Circuit held that: (1) "the 'bad faith' exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim," therefore precluding an award of attorney fees for work done on appeal; (2) the "common benefit" exception to the American Rule is inapplicable in the instant action; (3) the petitioner's civil rights claim was insubstantial; and (4) there could be no award of attorney fees for appellate work under Ohio law regarding the pendent assault and battery claim. The Sixth Circuit correctly interpreted this Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973) and recognized that the "common benefit" exception to the American Rule is inapplicable in the present action.[3]

B. The Sixth Circuit Correctly Interpreted This Court's Prior Decision in Holding That the "Bad Faith" Exception to the American Rule Does Not Permit Attorney Fees on Appeal for Acts Giving Rise to the Litigation

The longstanding American Rule is firmly embedded in American jurisprudence, and has been regularly reaffirmed by the Supreme Court in numerous decisions.

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3. Petitioner's contention that the law of the case doctrine precluded the Sixth Circuit from considering whether the "bad faith" exception applies to bad faith during the course of the litigation was correctly rejected; as the Sixth Circuit stated, the law of the case doctrine does not preclude an *en banc* court from overruling any panel decision. *See Van Gernert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978)(*en banc*), *aff'd on other grounds*, 444 U.S. 472 (1980) and *In Re Central R. Co.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1131 (1974), as cited in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (*en banc*).

Hensley v. Eckerhart, 461 U.S. 424 (1983); *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The systematic and long-term adherence to the rule can be attributed primarily to its strong underlying rationale that:

> . . . one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel.[4]

Several narrow exceptions have been judicially carved out of the American Rule, including the "bad faith" exception[5] and the "common benefit" theory.[6] This Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973) is cited by petitioner as setting forth the present day formulation in LMRDA cases of a pre-litigation "bad faith" exception for awarding attorney fees, although the award in *Hall* was firmly based on the "common benefit" rationale. *Hall* involved a suit brought by a Union member under §412 of the LMRDA to challenge his expulsion from Union membership. This Court held that by vindicating his own right to free speech, the Union member rendered a sub-

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4. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, at 718 (1967).

5. The "bad faith" exception to the American Rule allows attorney fees in cases in which the opposition has acted in bad faith. Although the limits to the "bad faith" exception had not been clearly defined, the Sixth Circuit maintained that the only bad faith existing in the present action was bad faith in the acts giving rise to the claim and held that the "bad faith" exception only allowed an award of attorney fees for bad faith during the course of the litigation. *Shimman*, 744 F.2d at 1230.

6. The "private attorney general" exception was essentially overruled by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

stantial service or "common benefit" to the Union as an institution, and to all of its members.[7] The Sixth Circuit's well reasoned opinion explained the "bad faith" exception, cited in this Court's dictum in *Hall*:

> Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice ¶54.77 [2], p. 1709 (2d Ed. 1972); *see, e.g. Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494 (CA4 1963); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

As the Sixth Circuit also noted, in MOORE'S FEDERAL PRACTICE the explanation is preceded with "where an unfounded

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7. The term "common benefit" as used in this context has come to mean that a substantial benefit conferred on an ascertainable class, and therefore, the cost of obtaining that benefit, such as attorney fees, should be spread among the entire class on a proportional basis. The lower courts correctly decided that the "common benefit" theory is inapplicable in this action because the petitioner only sought redress of his own wrongs, as opposed to those of an entire class.

Furthermore, petitioner incorrectly contends that this Court cited two Fourth Circuit cases in *Hall* that awarded fees due to bad faith conduct giving rise to the litigation. *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494 (4th Cir. 1963) and *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951). The Sixth Circuit correctly recognized that the *Rolax* court's award of attorney fees where there was also an award of injunctive relief which benefitted all minority firemen employed by the railroad, was based on a common benefit type of rationale, although the label "common benefit" was not specifically coined until this Court's decisions in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Hall v. Cole*, 412 U.S. 1 (1975).

action or defense is brought or maintained . . .". The *Hall* decision was clearly not based on any "bad faith" exception.

The petitioner incorrectly relies on a statement taken out of context in an attempt to establish that this Court expanded its decision in *Hall* to include a pre-litigation "bad faith" exception. The full statement in *Hall* is as follows:

> Petitioners also contend that the award of attorneys' fees in the case was improper because the District Court, in denying respondent's claim for punitive damages, found that "defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions." It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by "the dilatory action of the union and its officers . . ." 462 F.2d at 780. Moreover, although the presence of "bad faith" is essential to "fee shifting" under a "punishment" rationale, neither the presence nor "absence" of "bad faith" is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff *under the "common benefit" rationale recognized in Mills and operative today.* (emphasis added).[8]

Consequently, when read in the proper context, it is apparent that the Sixth Circuit was correct in finding that the award of attorney fees in *Hall* was not based on any "bad faith" exception.

In each case cited by this Court in its discussion of the "bad faith" exception in *Hall*, there was some finding

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8. *Hall*, 412 U.S. at 15.

that the defendants had shown bad faith as it related to the conduct of the litigation.[9] In the instant case, at no time during the course of the proceedings has there been a finding that the respondent has conducted the litigation in bad faith. As the Sixth Circuit stated, "there is no indication that the defense of this lawsuit was conducted in bad faith; nor is this a case where the defendant contumaciously refused to allow the plaintiff what was plainly owed, thus forcing the plaintiff to go to court." *Shimman*, 744 F.2d at 1233-34.

Clearly, the underlying rationale for fee-shifting under the "bad faith" exception is punitive in nature. *Hall*, 412 U.S. at 5. In other words, bad faith must exist on the part of the unsuccessful litigant in the course of litigation in order to justify an award of attorney fees under this exception.[10] The District Court in the present case awarded

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9. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (". . . the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable"; defendants could not and did not undertake at the trial to support their denials); *Vaughan v. Atkinson*, 369 U.S. 527, 528-31 (1962) (defendants did not bother even to admit or deny the validity of that claim, "respondents were callous in their attitude making no investigation of libellant's claim and by their silence neither admitting nor denying it."); *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494, 500 (4th Cir. 1963) (equitable remedy of awarding attorney fees because of long continued pattern of evasion and obstruction and other "discreditable" tactics); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951) (racially discriminatory and oppressive conduct by defendant including continuing to negotiate on their behalf without giving plaintiff opportunity to participate even after suit instituted).

10. Interestingly enough, the case of *Hall v. Cole* is cited precisely for this proposition in the Notes of the Advisory Committee on the 1983 Amendment to Rule 11 of the Federal Rules of Civil Procedure. New Rule 11 provides for the imposition of sanctions—including reasonable attorney fees—if any pleading, motion or other paper is *"interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless in-*

(Continued on following page)

the $75,000 in attorney fees as a punitive measure against Local 18 pursuant to applicable Ohio law.[11] That award was paid in full, thus fulfilling the punishment associated with the conduct under Ohio law. Absent any additional finding of bad faith during the course of the litigation, there is no articulable theory or basis upon which to award additional attorney fees for work done on appeal.

Petitioner also cites *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), in support of his contention that the "bad faith" exception applies to bad

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Footnote continued—

crease in the cost of litigation" (emphasis added). The Advisory Committee notably affirmed the principle that attorney fees properly are awarded under the "bad faith" exception only where such bad faith is related to the conduct of the litigation:

> The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney fees, to a litigant *whose opponent acts in bad faith in instituting or conducting litigation. See e.g. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

(Notes of Advisory Committee to Rule 11 as amended April 28, 1983, eff. Aug. 1, 1983).

11. In 1975, the District Court entered a judgment against all defendants and awarded attorney fees for services rendered at the trial level, based on the Ohio tort of assault and battery. In the 1980 appeal, a three judge panel reversed the imposition of liability against the International Union, reducing the amount of punitive damages. Shimman then filed an application for additional attorney fees for services rendered during the 1980 appeal. The District Court awarded the additional fees and the Sixth Circuit in the 1983 appeal affirmed the District Court's award of attorney fees for services rendered on appeal. At that point the court stated that the attorney fees would have also been allowed under the "bad faith" exception, based on the acts giving rise to the claim. The *en banc* decision reversed the prior decision by the Sixth Circuit, holding that attorney fees could not be recovered for appellate work under the "bad faith" exception.

faith in the conduct giving rise to the underlying claim. However, as the Sixth Circuit found, the *Alyeska* opinion merely cites to this Court's earlier decisions in *F.D. Rich Co., Inc. v. United States, etc.*, 417 U.S. 116 (1974) and *Vaughan v. Atkinson*, 369 U.S. 527 (1962), as establishing that there is a "bad faith" exception to the American Rule, and not that this Court intended in *Alyeska* to expand the "bad faith" exception to include bad faith in the conduct giving rise to the underlying claim.[12] Specifically, petitioner misinterpreted the holding in *F.D. Rich* in which this Court cited to cases that merely establish that there may be an award of attorney fees when there has been bad faith litigation conduct.[13] Petitioner fails to mention that in a subsequent statement in *F.D. Rich*, this Court cited *Hall* as authority for the "common benefit" exception to the American Rule, while there was no citation to *Hall* as authority for any "bad faith" exception. The absence of a cite to *Hall* with regard to any "bad faith" exception lends further support to the position that this Court in *Hall* merely referred to the "bad faith" exception in dicta, thereby failing to expand the doctrine to include bad faith conduct giving rise to the underlying litigation as a basis for an award of attorney fees. This also undermines petitioner's contention that this Court indicated, in *Alyeska*, its approval of a bad faith award of attorney fees for acts underlying the litigation.

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12. This Court stated in *Alyeska*:

> Also, a court may assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant' . . . or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' *F.D. Rich Co.*, 417 U.S., at 129, 40 L.Ed. 2d 703, 94 S.Ct. 2157(citing *Vaughan v. Atkinson*, 369 U.S. 527, 8 L.Ed. 2d 88, 82 S.Ct. 997 (1962); *cf. Universal Oil Products Co. v. Roof Refining Co.*, 328 U.S. 575, 580, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946).

13. *See* Petition for Writ of Certiorari, p. 14.

Petitioner here, as he did before the Sixth Circuit, contends that this Court supports the award of attorney fees for pre-litigation bad faith citing this Court's holding in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In so doing, petitioner has misinterpreted and overextended this Court's award of attorney fees in *Vaughan*. The Sixth Circuit corrected petitioner's interpretation, observing that in *Vaughan*, there was no finding of bad faith on behalf of the defendants. *Shimman*, 744 F.2d at 1231. Instead, the attorney fees were compensatory, and not punitive in nature.[14] Clearly, this Court's decision in *Vaughan*, correctly interpreted by the Sixth Circuit, cannot be used in support of petitioner's theory.

C. The Sixth Circuit's "Bad Faith" Holding, Denying Attorney Fees for Appellate Work, Is Supported by a Majority of the Circuits

Other courts of appeal properly applying the "bad faith" exception have affirmed the award of attorney fees against a party only where such bad faith is found in the conduct of the litigation, and then only for time expended at the district court level.[15] Once again the issue

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14. Petitioners tacitly admit in their petition that the attorney fee award in *Vaughan* was compensatory in nature. *See* Petition for Writ of Certiorari, p. 15, footnote 14.

15. This is contrary to the contention of petitioners that respondents "cited no decision by any court anywhere in the country holding that the bad faith exception does not apply to bad faith in the acts giving rise to the substantive claim." Petition for Writ of Certiorari, p. 8. *See Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980) (findings that defendants engaged in dilatory tactics during discovery and courtroom hearing, consistently failed to meet scheduled filing deadlines, misused the discovery privilege, and "seriously misled the Court by misquoting or omitting material portions of documentary evidence."); *Stovall v. Price Waterhouse Co.*, 652 F.2d 537, 542 (5th Cir. 1981) (no award of attorneys' fees where

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before the Sixth Circuit was whether attorney fees could be awarded for work done on appeal. Petitioner however offers a list of cases allegedly upholding attorney fee awards solely for bad faith conduct giving rise to the underlying claim.[16] In only one of the cases cited was there an award of attorney fees for work done on appeal and in that case, the court awarded attorney fees upon an equitable theory for the initiation of a frivolous or vexatious lawsuit.[17] Petitioner confuses acts which give rise to the litigation with the initiation of vexatious lawsuits, by referring to both as pre-litigation acts of bad faith.

Petitioner maintains that the Sixth Circuit's "bad faith" holding is contrary to other circuit courts, however the cases cited fail to base their holdings on the "bad faith" exception.[18] In addition, petitioner cites cases that

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Footnote continued—

party not in complete bad faith nor pursued appeal for frivolous reasons); *Perkins State Bank v. Connolly,* 632 F.2d 1306 (5th Cir. 1980) (award reversed where appellate court disagreed with lower court finding of oppressive behavior); *Copeland v. Martinez,* 603 F.2d 981, 983 (D.C. Cir. 1979) (award affirmed where plaintiff acted vexatiously, maliciously and in bad faith and intentionally abused the judicial process); *Straub v. Vaisman and Co.,* 540 F.2d 591 (3d Cir. 1976) (no award of fees where bad faith or vexatious conduct did not occur during the litigation process).

16. *See* Petition for Writ of Certiorari, p. 8, footnote 3.

17. *McEnteggart v. Cataldo,* 451 F.2d 1109 (1st Cir. 1971), *cert. denied,* 408 U.S. 943 (1972).

18. *See Schlein v. Smith,* 160 F.2d 22 (D.C. Cir. 1947) (Sixth Circuit held this case was inapplicable because it involved an attorney fee award as part of punitives in a willful fraud case, as opposed to an attorney fee award for a federal statutory claim for which punitives are inappropriate.); *Rolax v. Atlantic Coast Line R. Co.,* 186 F.2d 473 (4th Cir. 1951) (The Sixth Circuit correctly held that this case was based on the "common benefit" rationale, although that terminology was not available to the *Rolax* court because *Mills v. Electric Auto-Lite Co.,* 396

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fail to approve attorney fees for pre-litigation bad faith as an alternative to another exception or in conjunction with another exception.[19] Only one of those cases was based on the issue of whether attorney fees are available for work done on appeal.[20]

Contrary to decisions in both the Eighth and Ninth Circuits, the Sixth Circuit correctly interpreted *Hall* and *Alyeska*. In *Richardson v. Communication Workers*, 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976), cited by petitioner in support of petitioner's "bad faith" theory, the Eighth Circuit cited *Alyeska* as expanding the "bad faith" exception to the American Rule to bad faith in the acts giving rise to the action. However, as established previously, *Alyeska* merely cited to *F.D. Rich Co.* and *Vaughan* as establishing that there existed a "bad faith" exception; *Alyeska* did not purport to expand that exception to include bad faith giving rise to the litigation. Furthermore, the Sixth Circuit's correct interpretation of *Hall* properly disagreed with the holding of the Ninth Circuit in *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983). In *McQuiston*, the court incorrectly cited to *Hall* in support of the theory that attorney fees could be awarded for bad faith in either the acts giving

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Footnote continued—

U.S. 375 (1970) and *Hall v. Cole*, 412 U.S. (1975) had not yet been decided); *Bell v. School Board of Powhatan Cty., Virginia*, 321 F.2d 494 (4th Cir. 1963) (*en banc*) (a decision based on *Rolax* and based on general theory of equity); *Huecker v. Milburn*, 538 F.2d 1241 (6th Cir. 1976) (The Sixth Circuit correctly held that in *Huecker*, the Sixth Circuit made some statements in dicta which should not be considered to be inconsistent with its holding in the instant case).

19. See cases cited by petitioner in Petition for Writ of Certiorari, pages 9 and 10, footnotes 4 through 7.

20. *See Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (per curiam).

rise to the litigation or occurring during the course of the litigation. The Ninth Circuit remanded the case to determine whether the facts warranted an award of attorney fees for work done at the trial level only. As the Sixth Circuit's interpretation of both *Alyeska* and *Hall* was correct, it should stand. The disagreement between the Sixth, Eighth and Ninth Circuits does not constitute substantial conflict among the circuits, sufficient to warrant the intervention of this Court.

D. The Sixth Circuit Correctly Decided That the "Common Benefit" Theory Is Inapplicable in the Present Case

Petitioner's contention that the District Court's award of attorney fees can be supported by the "common benefit" exception to the American Rule is erroneous, considering that both the District Court and the Sixth Circuit have held that the "common benefit" theory is inapplicable in the instant action. The "common benefit" theory poses another exception to the American Rule on attorney fees. The rationale behind the theory is that because a substantial benefit is conferred upon an ascertainable class, the cost of obtaining such benefit should be spread among the entire class on a proportional basis. The "common benefit" exception was adopted for use in LMRDA cases by this Court in *Hall v. Cole*, 412 U.S. 1 (1973). This Court held in *Hall*, that the plaintiff, by vindicating his own right to free speech, rendered a substantial service or "common benefit" to the Union as an institution, and to all of its members.

In terms of "common benefit", the facts of the present case present a stark contrast to those of *Hall*. Shimman was awarded compensatory and punitive damages for his own personal injuries, and obtained no other relief bene-

fitting other Union members.[21] The Sixth Circuit correctly rejected Shimman's argument that although the monetary awards of compensatory and punitive damages were not held in common, a substantial benefit was rendered to the Union membership by "restoring democracy". Both *Hall* and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) require "that the benefit be received in common by those against whom the fee award operates." *Shimman*, 744 F.2d at 1235. Even if Shimman did "restore democracy" to the Union, any benefit arising from this is incidental and insufficient to warrant a fee award. Any such burden of a fee award must be received in proportion to the benefit imposed on the whole class, including Shimman.[22] If the fee award were upheld based on the "common benefit" theory, Shimman would pay no greater portion of the fees than other Union members who received the incidental benefit of Shimman's "catalyst", although Shimman received approximately $107,000 in compensatory damages and $145,000 in punitive damages, Shimman would therefore receive a disproportionate benefit.

The present case does not involve a situation in which Shimman brought an action for injuries shared by other Union members. Thus, this was not a case where the cost of the litigation is shifted to "the class that benefited from

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21. In the 1980 appeal, the Sixth Circuit stated that "this suit only seeks redress of one of the dissidents' wrongs" and in turn reduced the amount of punitive damages by $150,000 because "the ones who will end up paying for the punitive damages award are the union members." *Shimman*, 625 F.2d at 102-03. In other words, the Sixth Circuit reasoned that any excessive punitive award would result in a "common detriment" as opposed to "common benefit".

22. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 5 (1975); *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (*en banc*), *rev'd on other grounds sub nom.*, 421 U.S. 240 (1975); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

them [the costs of litigation] and that would have had to pay them [the costs of litigation] had it brought the suit." *Hall*, 412 U.S. at 7, *Mills*, 396 U.S. at 397. Shimman's injuries were personal injuries for which other Union members could not seek redress. Petitioner is requesting attorney fees from the Union membership which are disproportionate to any residual benefit which may have been conferred onto the Union membership by his "catalyst". Thus, the Sixth Circuit correctly determined that the "common benefit" theory is inapplicable in the present case.

Petitioner incorrectly asserts that the Sixth Circuit's *en banc* opinion conflicts with decisions in six other circuits. In support of this contention, petitioner refers to cases in which the benefit received by the Union members was far more tangible and substantial than petitioner's "catalyst".[23] Similarly, petitioner inappropriately relies upon cases in which relief is sought based on a Union's

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23. *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) (both monetary damages and an injunction were granted to the Union members for prohibitive disciplinary actions); *Rosario v. Amalgamated Ladies Garment Cutters' Union, Local 10*, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) (both an injunction and punitive damages were awarded to Union members who sought a nullification of the Union's internal disciplinary proceedings); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (9th Cir. 1977) (the award was granted for the Union's breach of its duty of fair representation and the court held that by protecting the Union members' rights to be hired directly by an employer or through a specific request to the Union, there was a substantial service to the Union and to the persons it represented); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976) (relief sought against the Union in order to remedy a refusal to install duly elected Union officers and to discontinue an invalid trusteeship). These decisions are in agreement with the position of the Sixth Circuit that there must be a substantial benefit conferred, even though there is no mention of the specific proportionality language of *Hall* and *Mills*.

breach of its duty of fair representation[24] as support for petitioner's theory that the "catalyst" provided by petitioner was a sufficient benefit conferred upon a common class to justify attorney fees.[25] Relief granted to Union members as a result of a breach of the duty of fair representation is illustrative of an action brought for injuries shared by other Union members, whereas the action brought by petitioner did not seek such relief. In addition, there is a substantial common benefit to Union membership when the Union is held to its duty of fair representation. Consequently, the cases cited by petitioner involving a breach of the Union's duty of fair representation do not conflict with the Sixth Circuit's decision in the present action.

E. Petitioner Fails to Pose a Question for This Court on His §§1985 and 1986 Claims Absent Discrimination Against a Constitutionally Protected Class

The Sixth Circuit correctly rejected the petitioner's claim that because his rights were violated under 42 U.S.C. §1985(3) and §1986, he is entitled to attorney fees under 42 U.S.C. §1988.[26] These claims were dismissed by the

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24. *See Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir. 1981); *Stein v. Mutual Clerks' Guild of Mass., Inc.*, 560 F.2d 486 (1st Cir. 1977); *Bradford v. Textile Workers of America*, 563 F.2d 1138 (4th Cir. 1977); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (9th Cir. 1977).

25. Similar reasoning applies to the petitioner's erroneous application of the following case to the instant action: *Maceira v. Pagan*, 698 F.2d 38 (1st Cir. 1983) (Award sought for the reinstatement of a Union steward, awarded by the Union members poses a common benefit).

26. The Sixth Circuit correctly decided not to discuss the §§1985(3) and 1986 claims separately, because the §1986 claim is based on the §1985(3) claim. *Shimman*, 744 F.2d at 1236, footnote 15.

District Court, and the Sixth Circuit panel in the 1980 appeal refused to address Shimman's cross-appeal of that dismissal. This is not a case which involves a constitutionally protected civil right; instead, it involves rights granted by statute and protected by the National Labor Relations Board. Thus, the Sixth Circuit sitting *en banc* correctly held the petitioner's §1985(3) claim to be insubstantial because he failed to allege or prove the kind of racially discriminatory intent necessary to establish such a violation. In addition, because the civil rights claims made by petitioner are unrelated to the success of his LMRDA claims, petitioner could not be entitled to attorney fees under §1988.

Petitioner's claim is unrelated to a constitutionally protected right. In *Maher v. Gagne,* 448 U.S. 122 (1980), this Court held that attorney fees are granted under §1988 "in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim" regardless of the outcome of the civil rights claim.[27] Section 1988 also provides for an attorney fee award for a plaintiff who is successful on a state law claim pendent to a substantial federal civil rights claim left undecided.[28] However, petitioner's claim is neither a substantial civil rights claim nor a constitutional claim.

Petitioner erroneously claims that the present case involves a civil rights violation because there is a conspiracy to deprive dissident Union members of the equal protection of the LMRDA. However, this Court clearly set forth the requirements for the type of discriminatory intent necessary to prove a §1985(3) claim, holding:

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27. 448 U.S. at 130-33.

28. *See Seals v. Quarterly County Court,* 562 F.2d 390 (6th Cir. 1977).

> [t]he language [in §1985(3)] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. (Emphasis in original; footnote omitted).[29]

Certainly, as the Sixth Circuit decided, there is no "invidious" discrimination against a constitutionally protected "class" in this case; instead, petitioner's group of dissidents is an "arbitrarily-chosen group."[30]

Petitioner cites this Court's decision in *Hagans v. Lavine*, 415 U.S. 528 (1974), as support for the proposition that his §§1985(3) and 1986 claims were substantial. Petitioner neglected to cite in its entirety this Court's rationale with regard to the substantiality doctrine, by thus failing to include the clarifying statement immediately following petitioner's cited quote. That statement is as follows:

> The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned . . . But it remains the federal rule and *needs no reexamination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.* (Emphasis added).

The claim made in *Hagans* was substantial in part because it challenged the constitutionality of state action which deprived persons of their constitutional rights within the

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29. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), as cited in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984).

30. *Shimman*, 744 F.2d at 1237.

meaning of §1983 and §1343(3).[31] Petitioner's claims in the present case are quite distinct, and remain insubstantial in light of *Hagans*, since there is neither a substantial civil rights claim nor a constitutional claim.

In *United Brotherhood of Carpenters v. Scott*, 103 S.Ct. 3352 (1983), this Court applied the *Griffin* §1985(3) standard in a Title 29 action holding that §1985(3) could not be applied to conspiracies involving animus against non-union workers. The Sixth Circuit correctly refused to apply §1985(3) to animus between two union groups, in light of this Court's decision in *Scott*, reasoning that "if §1985(3) does not reach animus against non-union workers, it certainly does not reach animus one union faction holds for another."[32] Thus, under either *Griffin* or *Scott*, the petitioner's §1985(3) claims are insubstantial and attorney fees, therefore, may not be awarded under §1988.

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31. The claim was also substantial because there were indications of equal protection violations and the rational basis of the state regulation was in question.

32. *Shimman*, 744 F.2d at 1236-37.

CONCLUSION

In light of the absence of substantial conflict among the circuits with regard to the Sixth Circuit's holding in the present action, and of an absence of a substantial civil rights claim or constitutional claim, the respondent respectfully requests this Court to deny the instant petition, thus preventing the petitioner from recovering attorney fees for services rendered on appeal.

Respectfully submitted,

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